Supreme Court, U. S.
FILED
OCT 8 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-389

CARL E. PERSON,

Petitioner,

v.

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT, SUPREME COURT, APPELLATE DIVISION, SECOND DEPARTMENT, and ATTORNEY GENERAL OF NEW YORK STATE,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

This brief is filed by defendants-respondents Supreme Court of the State of New York, Appellate Division, First Department, Supreme Court of the State of New York, Appellate Division, Second Department, and the Attorney General of New York State, in opposition to plaintiff-petitioner Carl E. Person's Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit, dated September 12, 1977.

The Association of the Bar of the City of New York, the remaining defendant, did not take an appeal to the Court of Appeals because it is merely an investigative and prosecutorial agency of one of the defendants, the Supreme

Court of the State of New York, Appellate Division, First Department (60a; First Department Rules, § 603.4).

Petitioner, an attorney *pro se*, seeks review of a unanimous decision of a panel of the United States Court of Appeals for the Second Circuit composed of Chief Judge Irving Kaufman, Judge J. Joseph Smith and Judge William H. Mulligan, which reversed the decision of the United States District Court for the Eastern District of New York (Judge John F. Dooling; 37a-63a).

The District Court had declared Disciplinary Rule 7-109C of The Lawyer's Code of Professional Responsibility, as adopted by the New York State Bar Association ("DR 7-109C"), and that Rule as incorporated in Rule 603.2 of the Rules of the Appellate Division, First Department, and Rule 691.2 of the Appellate Division, Second Department, unconstitutional insofar as the Rule proscribes the payment of reasonable fees for the professional services of expert witnesses *if payment of the fees is contingent upon the outcome of the case* (21a-33a).

It should be noted that neither the American Bar Association, which promulgated The Lawyer's Code of Professional Responsibility (60a), nor the New York State Bar Association, which adopted it to govern Attorneys' conduct in New York (42a), was made a party to this litigation. Their Rule had been declared unconstitutional by the District Court in their absence. The American Bar Association adopted the Code of Professional Responsibility on August 12, 1969, effective January 1, 1970. Martindate-Hubbell Law Directory, Vol. VI, Preface, p. ii to Part VIII, IC. The New York State Bar Association adopted the Code, effective January 1, 1970. McKinney's Consolidated Laws of New York, Book 29, Judiciary Law, Appendix, pocket part, p. 100.

Questions Presented

1. Was the District Court without subject matter jurisdiction because of the lack of a case or controversy?

2. Is Disciplinary Rule 7-109C a reasonable and rational regulation which neither denies petitioner Person access to the courts, nor violates the Equal Protection or Due Process Clauses of the Fourteenth Amendment or the First Amendment?

Statement of the Case

(1)

In his Amended Complaint (which plaintiff has not included in his Appendix), plaintiff, an attorney appearing *pro se*, sought to strike down, as unconstitutional and in violation of the antitrust laws, those provisions of the Judiciary Law of New York, Rules of the four Appellate Divisions of the New York Supreme Court and Disciplinary Rules of The Lawyer's Code of Professional Responsibility, as adopted by the New York Bar State Association, which prohibited plaintiff and his clients from selling antitrust lawsuits based upon those claims, and from paying expert witnesses on a contingent fee basis. More particularly, plaintiff claimed, *inter alia*, that the prohibitions against champerty, maintenance, barratry, splitting fees with a layman, unauthorized practice of law, and paying contingent fees to expert witnesses violated his First and Fourteenth Amendment rights, posed a threat to the republican form of government, and were a burden on interstate commerce (3a, *et seq.*).

Plaintiff moved for the convening of a three-judge court claiming that his complaint presented substantial constitutional issues. Defendants opposed the motion on the grounds that substantial constitutional issues were not pre-

sented and that plaintiff was merely seeking an advisory opinion and should properly have presented the matter to the Ethics Committee of the Association of the Bar of the City of New York. By Memorandum and Order dated March 24, 1976, the District Court denied plaintiff's motion for a three-judge court, but expressed the view that with respect to DR 7-109C plaintiff was "in the classic declaratory judgment plaintiff's posture" (1a-20a).

Plaintiff then moved for a summary declaratory judgment invalidating DR 7-109C. This motion was granted by the District Court, in Memorandum and Order dated June 25, 1976, although it declined to direct that judgment be entered (21a-33a). Thereafter, plaintiff moved for dismissal without prejudice of Counts One and Two of his Amended Complaint* and for an order directing that final judgment be entered declaring DR 7-109C (and that Rule as incorporated in the Rules of the Appellate Divisions of the First and Second Departments) unconstitutional to the extent that it proscribes the payment of reasonable fees for the services of an expert witness if payment of the fees is contingent upon the outcome of the case. By Memorandum and Order dated August 10, 1976, the court granted this motion (34a-36a).

Respondents herein appealed to the United States Court of Appeals for the Second Circuit and in an opinion dated April 29, 1977 (App. E) that court reversed the judgment of the District Court. Mr. Person then filed a petition for a rehearing with a suggestion that the action be reheard *en banc* which was denied by orders of the court dated June 19, 1977 (App. F and G).

The "facts" presented in the Petition are in dispute, contrary to petitioner's assertions (Pet. 33). Because of the procedural posture of the case (primarily the pendency of

* Thus he abandoned all issues except that relating to the validity of the restriction upon contingent expert fees.

petitioner's motion for a three-judge court), no discovery was sought by respondents. However, in the affidavit and brief of the Association of the Bar of the City of New York in opposition to petitioner's motion for summary judgment and during oral argument, it was contended that petitioner's affidavits were conclusory in nature and that it was necessary to obtain the underlying facts in order for the District Court to properly determine the motion. Moreover, it was contended that the District Court should not decide the motion based solely on petitioner's affidavits without affording respondents the opportunity to test the statements made in the affidavits, especially since the issue involved was the constitutionality of a State rule.

(2)

Plaintiff's challenge to DR 7-109C is founded on the following allegations in his Amended Complaint. Plaintiff alleged that he is the attorney for ten plaintiffs ("Nabcor Plaintiffs") in an antitrust action in the Southern District of New York, *National Auto Brokers Corp.* v. *General Motors Corp.* (70 Civ. 5421), the "Nabcor Action". See published opinions in the Nabcor Action in 332 F.Supp. 280 (1971); 60 F.R.D. 476 (1973); and 376 F.Supp. 620 (1974).

In the Nabcor Action which, at the time of the District Court's decision, was being tried before District Judge Griesa (*see, e.g.*, 176 N.Y.L.J. No. 91, p. 19, Nov. 10, 1976), Nabcor Plaintiffs sought damages which they alleged were sustained by them as a result of conspiratorial activities by General Motors Corporation, General Motors Acceptance Corporation, Ford Motor Company, Chrysler Corporation, American Motors Corporation, First National City Bank and various other defendants, which drove Nabcor Plaintiffs out of business. Nabcor Plaintiffs sought in the aggregate $300,000,000 in damages after trebling.

Plaintiff further alleged that neither the National Auto Brokers Corporation ("Nabcor"), nor any of the other

Nabcor Plaintiffs,* had the ability to pay the expenses of litigating the Nabcor Action and that this had resulted in a substantial reduction in plaintiff's and Nabcor Plaintiffs' ability to prosecute the action and to obtain a speedy and just resolution of the issues. Plaintiff further alleged that because of their poor financial condition the Nabcor Plaintiffs were unable to obtain adequate expert testimony in the fields of accounting, franchising, finances and economics unless the experts were paid on a contingent fee basis which DR 7-109C prevents. Petitioner now states that the "trial in the Nabcor Action was held during October, November and early December, 1976, and the action was dismissed, at the end of plaintiffs' case, for alleged insufficiencies of evidence." (Pet. 6)

ARGUMENT

I

There Is No Case Or Controversy Because Plaintiff Did Not Have An Expert Ready, Willing And Able To Assist In The Prosecution Of The Nabcor Action On A Contingent Fee Basis.

Plaintiff presented the court with a purely hypothetical set of facts. In his original Statement Pursuant to Local Rule 9(g) of the Eastern District of New York, plaintiff did not allege that he and the Nabcor Plaintiffs had an expert ready, willing and able to assist in the prosecution of the Nabcor Action for a contingent fee. In fact, it was evident that plaintiff had not even located an expert, and was merely speculating that "[s]ome arrangements by

* It is not clear from the record how many of the Nabcor Plaintiffs are corporations. However, it appears from a reported decision in the Nabcor Action that at least three are corporations and one is a partnership. *National Auto Brokers Corp.* v. *General Motors Corp.*, 376 F.Supp. 620 (S.D.N.Y. 1974).

plaintiff and his clients with expert witnesses to pay them reasonable fees on a contingent basis *are possible*. . . ."

Absent an expert ready to testify for a contingent fee, the case was merely hypothetical because it is just as easy to speculate that petitioner would not be able to obtain an expert ready, willing and able to testify on a contingent fee basis. Since petitioner did not produce such an expert, this controversy was not real and substantial. *Aetna Life Insurance Co.* v. *Haworth*, 300 U.S. 27, 241 (1937). As in *United Public Workers* v. *Mitchell*, 330 U.S. 75, 91 (1947), "[n]o threat of interference . . . with rights of [plaintiff] appears beyond that implied by the existence of the law and the regulations". The District Court was, thus, without subject matter jurisdiction.

In his Amended Statement pursuant to Rule 9(g) (Resp. App. B) petitioner unsuccessfully attempted to rectify this jurisdictional defect. There he conceded that at the time of the hearing upon his motion, he was *still* "in substantial, present need of locating and retaining experts". Although in his Supplemental Affidavit (Resp. App. C), served on the day of the hearing on his motion for summary judgment, petitioner did claim that an individual named Spector would testify on a contingent fee basis, no agreement with him had yet been reached because Spector desired to know more about the case and what the work entailed.

The District Court in its decision of June 25, 1976, avoided this issue by concluding that the "Rule, unless ignored, must of itself foreclose a lawyer's effort to obtain expert testimony and go far to deny to the lawyer the opportunity to demonstrate the availability of such testimony and its specific place in particular cases". (App. E, p. 23a)

Of course, respondents take issue with this conclusion. DR 7-109C does not and did not prevent plaintiff from arranging with an expert to testify on a contingent fee basis *provided* DR 7-109C was declared unconstitutional. Since he failed to do so, there was no case or controversy.

The Court of Appeals did not address this issue.

II

DR 7-109C Is A Reasonable Exercise Of The Broad Power Which States Have Over Attorneys And The Conduct Of Judicial Proceedings.

(A) DR 7-109C Is A Reasonable Rule.

The basis of petitioner's constitutional challenge to DR 7-109C is that the Rule is irrational and operates to discriminate against those who cannot afford expert testimony and tends to deny to the less affluent access to the courts in cases which, if fairly and fully tried, might be shown to be meritorious. The Court of Appeals rejected this argument and concluded as follows (App. E, pp. 52a-53a):

> "It may be conceded that litigation of difficult and complex matters by persons with small individual stakes in the outcome may be aided and encouraged by elimination of the prohibition against the hiring of experts whose fees may be contingent upon the results. We are not convinced, however, that there is no danger of the inducement of false expert testimony by such contingency arrangements."
>
> "The legislature has made a judgment that the need for discouragement of contingent fee arrangements outweighs the obstacle to financing litigation which a ban on contingent fees may create. We cannot say that this legislative jugment is irrational. The extent of the obstacle and the weight to be given its existence when balanced against the likelihood of false testimony and unfair results from permitting the procurement of expert testimony by the offer of a stake in the outcome are matters of judgment best confided to legislative and judicial bodies of the state."

Disciplinary Rule 7-109C provides as follows:

> "A lawyer shall not pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent upon the content of his testimony or the outcome of the case. But a lawyer may advance, guarantee, or acquiesce in the payment of:
>
> 1. Expenses reasonably incurred by a witness in attending or testifying.
>
> 2. Reasonable compensation to a witness for his loss of time in attending or testifying.
>
> 3. A reasonable fee for the professional services of an expert witness."

The rationale for the proscription against payment of compensation to a witness contingent upon the outcome of the case is manifest. The State of New York, through its judiciary, has concluded by its Appellate Division rules that the presence of the contingency, in and of itself, tends to cause an expert witness to testify as to a particular state of facts or opinion more likely to enhance the chances for a favorable outcome of the litigation so that compensation will be forthcoming (whether a fixed amount or a percentage of the judgment).*

The New York courts had come to this conclusion independently before the rule became included in the Code of

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* Moreover, the courts of the State of New York have refused to enforce the underlying contract between the experts seeking to be paid on a contingent basis and the client on the ground that the contract is against public policy. *Matter of Shapiro*, 144 App. Div. 1, 128 N.Y.S. 852 (1st Dep't 1911). This is the short answer to petitioner's argument that DR 7-109C violates the Equal Protection Clause (Pet. 35) in that, while it prohibits attorneys from engaging experts on a contingent fee basis, it does not prohibit the client himself from hiring an expert for a contingent fee. Such a prohibition is unnecessary. Furthermore, it must be obvious that The Lawyers' Code of Professional Responsibility does not seek to regulate the conduct of non-lawyers.

Professional Responsibility. *Matter of Schapiro,* 144 App. Div. 1, 128 N.Y.S. 852 (1st Dept. 1911); *Matter of Imperatori,* 152 App. Div. 86 (1st Dept. 1912); *Laffin* v. *Billington,* 86 N.Y. Supp. 267 (App. Term, 1st Dept. 1904); *see also Wellington* v. *Kelly,* 84 N.Y. 543 (1881). *See also* the limited decision by a divided court in *Marine Midland Trust* v. *40 Wall Street Corp.,* 13 App. Div. 2d 118 (1st Dept. 1961), *aff'd,* 11 N.Y. 2d 679 (1962), dealing with the approval of appraisers' fees in a court-administered derivative action and Burchill Act reorganization proceeding. Note that even in such a court-administered proceeding, Judge Steuer, in his dissent, thought it unwise to allow the slightest breach in the Rule (p. 132):

> "The authorities collated are, in this State at least, unanimous in their condemnation of any practice which makes the compensation of a witness dependent on the outcome of the litigation. . . . The time of a professional witness can be bought; his opinion should not be vendable."

It is this tendency to false swearing which the Appellate Divisions of the Supreme Court of the State of New York, pursuant to their inherent power to control the conduct of judicial proceedings and pursuant to Section 90(2) of the Judiciary Law, have identified in their Rules as an evil and have proscribed.

An expert, who will be paid in any event, is paid for his time and effort in examining facts and forming an opinion in his given area of expertise. If the opinion of the expert, after such an examination, is unfavorable to the party who engaged the expert, presumably that expert will not be called to testify. But *in any event,* the expert will be compensated for his time and labor; and thus there is no expectation that he will testify untruthfully because of the fee. However, an expert engaged on a contingent basis, no matter how reasonable that fee might be, is in a vastly

different position because he will be compensated only if the outcome of the case is favorable. Thus *the ordinary expectation* is that there will be a tendency to falsify his testimony in order favorably to affect the outcome of the case. This expectation is not irrational.

Numerous states, even prior to the adoption of the Code of Professional Responsibility, recognized the evils inherent in compensating an expert witness on a contingent fee basis. The underlying contract was generally held to be against public policy. Restatement of the Law, Contracts, § 552(2); 14 Williston, Contracts, § 1716, p. 879 (3rd ed. 1972); and 6A Corbin, Contracts, § 1430, p. 379. *See, e.g., Goodyear Tire & Rubber Co.* v. *Overman Cushion Tire Co.,* 95 F.2d 978 (6th Cir. 1938); *Von Kesler* v. *Baker,* 21 P.2d 1017 (Cal. 1933); *Van Norden* v. *Metson,* 171 P.2d 485 (Cal. 1946); *Belfonte* v. *Miller,* 243 A.2d 150 (Pa. 1968); *Laos* v. *Soble,* 503 P.2d 978 (Ariz. 1972); *Wright* v. *Corbin,* 67 P.2d 868 (1937 Wash.); *Pelkey* v. *Hodge,* 296 P. 908 (Cal. 1931); *Henderson* v. *Hall,* 112 S.W. 171 (Ark. 1908); *Burchell* v. *Ledford,* 10 S.W.2d 622 (Ky. 1928); *Bowling* v. *Blum,* 52 S.W. 97 (Tex. 1899); *Duteau* v. *Dresbach,* 194 P.547 (Wash. 1920); *Thatcher* v. *Darr,* 199 P.938 (Wyo. 1921).

Moreover, most, if not all states now have some form of prohibition against the participation of an attorney in paying contingent fees to expert witnesses. The prohibition, contained in the American Bar Association's Code of Professional Responsibility, generally is incorporated in the rules governing the practice of law in each such state or in state statutes.

It was certainly reasonable for the New York Courts to conclude, as have others, that the existence of the contingency in itself tends to cause false testimony and they are well within their power in establishing a prohibition against it.

(B) States Have A Compelling Interest In Regulating The Conduct Of Attorneys That Practice Before Them And Are Free To Regulate The Procedure Of Their Courts.

(1)

It is beyond dispute that states have a compelling interest in regulating the conduct of professionals who practice within their borders. *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, 792 (1975); *Bigelow* v. *Commonwealth of Virginia*, 421 U.S. 809, 825 n.10 (1975); *United States* v. *Oregon State Medical Society*, 343 U.S. 326, 336 (1952); *Semler* v. *Oregon State Board of Dental Examiners*, 294 U.S. 608, 611-13 (1935). In *Goldfarb*, this Court, while declaring a minimum fee schedule for lawyers violative of Section 1 of the Sherman Act, 15 U.S.C. § 1, nevertheless acknowledged the great interest which states have in regulating professional activity (421 U.S., at p. 792):

> "We recognize that the States have a *compelling interest* in the practice of professions within their boundaries, and that as part of their power to protect the public health, safety, and other valid interests they have broad power to establish standards for licensing practitioners and regulating the practice of professions."

It is clear from *Goldfarb*, moreover, that states have an even greater interest in regulating the conduct of attorneys. In his majority opinion, Mr. Chief Justice Burger observed that "[t]he interest of the States in regulating lawyers is *especially great* since lawyers are essential to the primary governmental function of administering justice; and have historically been 'officers of the court.'" *Goldfarb* v. *Virginia State Bar, supra*, 421 U.S., at 792 (emphasis added).

Historically, courts have had supervisory powers over the conduct of attorneys, *Lathrop* v. *Donohue*, 367 U.S. 820 (1961); *Theard* v. *United States*, 354 U.S. 278 (1957);

Powell v. *Alabama*, 287 U.S. 45 (1932); *Ex Parte Secombe*, 19 Howard 9 (1856); *Estates Theatres, Inc.* v. *Columbia Pictures Industries, Inc.*, 345 F.Supp. 93 (S.D.N.Y. 1972); *Rubin* v. *Katz*, 347 F.Supp. 322 (E.D. Pa. 1972). "[I]t may be said that the power of a court to enforce the Code [of Professional Responsibility] is founded on its supervisory power over members of the bar." *Estates Theatres, Inc.* v. *Columbia Pictures Industries, Inc., supra*, 345 F. Supp., at 95 n.1 (Weinfeld, J.). See also *Gair* v. *Peck*, 6 NY 2d 97 (1959), app. dism. 361 U.S. 374 (1960).

(2)

The Rule at issue here rests not merely upon the power to regulate the *conduct of attorneys*, but also upon the power of a state through its judiciary to regulate the *procedures* which govern the conduct of judicial proceedings.

Expert testimony is particularly susceptible to abuse because by its very nature it concerns areas of knowledge with which the ordinary juror and the court are unfamiliar, and since the jury and the court generally rely on this testimony, it is incumbent upon the State to insure that the fee paid to an expert does not cause him to testify falsely. DR 7-109C is a regulatory measure intended to accomplish this purpose.

DR 7-109C is not intended to root out all untruthful testimony. The Rule is directed at a particular problem of trial procedure, namely avoiding testimony by experts with a contingent interest in the outcome of the case. To be sure, the area of expert testimony is not free from difficulties. But respondents respectfully contend that allowing experts to testify on a contingent basis may only exacerbate those problems.

It is well established that a state is free to regulate the procedure of its courts, including its rules of evidence "in accordance with its own conception of policy and fairness unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to

be ranked as fundamental". *Snyder* v. *Massachusetts*, 291 U.S. 97, 105 (1934); *Burgett* v. *Texas*, 389 U.S. 109, 113-14 (1967). *See Rideau* v. *Louisiana*, 373 U.S. 723 (1963); *Bute* v. *Illinois*, 333 U.S. 640 (1948); *Brown* v. *Mississippi*, 297 U.S. 278 (1936); *Hardware Dealers Mutual Fire Insurance Co.* v. *Glidden Co.*, 284 U.S. 151 (1931); *Dohaney* v. *Rogers*, 281 U.S. 362 (1930); *Frank* v. *Mangum*, 237 U.S. 309 (1915); *Twining* v. *New Jersey*, 211 U.S. 78 (1908); *Rogers* v. *Peck*, 199 U.S. 425 (1905); *Maxwell* v. *Dow*, 176 U.S. 581 (1900); *Hurtado* v. *California*, 110 U.S. 516 (1884).

It is also established that "[a State's] procedure does not run afoul of the Fourteenth Amendment because another method may seem to our thinking to be fairer or wiser . . ." *Snyder* v. *Massachusetts, supra*, 291 U.S., at 105.

(C) DR 7-109C Is Rational And Does Not Deny Equal Access To The Courts.

Despite the broad power which states have to regulate attorneys and the procedures within their courts, petitioner nevertheless argues that the prohibition against the payment of contingent fees to experts is irrational and constitutes a denial of equal access to the courts. Petitioner has argued that the case is governed by *Boddie* v. *Connecticut*, 401 U.S. 371 (1971) and that *United States* v. *Kras*, 409 U.S. 434 (1973), is inapplicable. The Court of Appeals rejected this analysis and found that there had been no denial of access to the courts because Nabcor Plaintiffs were actually *in court* actively litigating their claim and found petitioner's reliance on *Boddie* misplaced.

Boddie was an action brought on behalf of all those female welfare recipients who resided in Connecticut, and who desired divorces, to declare invalid Connecticut statutes as applied to them which required payment of court fees and costs for service of process as a condition precedent to obtaining a divorce. This Court declared the fees unconstitutional as applied on the ground that they violated due process, but expressed the following caveat (401 U.S., at 382-383):

> "In concluding that the Due Process Clause of the Fourteenth Amendment requires that these appellants be afforded an opportunity to go into court to obtain a divorce, we wish to re-emphasize that we go no further than necessary to dispose of the case before us, a case where the bona fides of both appellants' indigency and desire for divorce are here beyond dispute. *We do not decide that access for all individuals to the courts is a right that is, in all circumstances, guaranteed by the Due Process Clause of the Fourteenth Amendment so that its exercise may not be placed beyond the reach of any individual, for, as we have already noted, in the case before us this right is the exclusive precondition to the adjustment of a fundamental human relationship.* The requirement that these appellants resort to the judicial process is entirely a state-created matter. Thus we hold only that a State may not, consistent with the obligations imposed on it by the Due Process Clause of the Fourteenth Amendment, pre-empt the right to dissolve this legal relationship without affording all citizens access to the means it has prescribed for doing so." (Emphasis added)

Thus *Boddie* carefully circumscribed its requirement of access to the courts to situations involving a state-preempted right to dissolve marriage, where resort to the courts was the exclusive means of asserting that right, where the poverty of plaintiffs was conceded and where there was involved a fundamental interest, marriage.

The Court of Appeals placed reliance upon *United States* v. *Kras, supra*, which the District Court summarily dismissed (26a, 51a). *Kras* was a suit brought by an indigent

challenging the constitutionality of certain *government-imposed fees*, fixed by the bankruptcy laws upon filing of a petition in bankruptcy, payment of which was a condition precedent to a voluntary discharge in bankruptcy. Citing *Boddie*, plaintiff Kras claimed that he was unable to pay these fees and thus was not able to obtain a discharge in bankruptcy with the consequence that his Fifth Amendment right to access to the bankruptcy court was abridged.

This Court, however, distinguished *Boddie* holding that Kras' interest in eliminating his debt burden did not rise to the same constitutional level as the dissolution of a marriage and that alternatives were available to him other than the courts. *See Ortwein* v. *Schwab*, 410 U.S. 656 (1973), where Oregon's $25 appellate court filing fee was determined to be neither violative of the Due Process or Equal Protection Clauses; *cf. Lindsey* v. *Normet*, 405 U.S. 56 (1972).

A comparison of *Boddie* and *Kras* leads inexorably to the conclusion that the reasoning of the Court of Appeals is eminently sound. The instant case falls squarely within *Kras* (if, indeed it is an "access" case); *Boddie* is clearly inapposite.*

Unlike *Boddie* and *Kras*, moreover, the Nabcor Plaintiffs were at the time that this action was brought, actually in court actively litigating the Nabcor Action. Since the

* Unlike both *Boddie* and *Kras*, this case does not involve government-imposed fees as a condition of access to the courts. Nor does it involve an indigent. The record is devoid of any facts establishing that any of the individual Nabcor Plaintiffs are impoverished. There is no claim, for example, that they are on welfare. To the contrary, the record shows that certain of Nabcor Plaintiffs are employed, presumably as businessmen, and they are too busy working to testify as experts on their own behalf. Plaintiff's claim is merely that the Nabcor Plaintiffs are "unable" to pay the fees for expert testimony, and not that they are indigents. And unlike *Boddie* and *Kras*, even this claimed inability was not *conceded*.

Nabcor Plaintiffs were beyond the threshold of the court, this is not really an "access" case. In both *Boddie* and *Kras* the fees actually prevented the individuals from commencing the action.

As recognized by the Court of Appeals, *Boddie* is distinguishable from the instant case in a number of additional respects. (App. E, pp. 50a-53a) First, and perhaps foremost, *Boddie* dealt with the marriage relationship which "involves interests of basic importance in our society". 401 U.S., at 376. Here no such basic right is involved. Plaintiff and his clients are merely seeking damages to their businesses for alleged antitrust violations. As stated in *Kras*, "bankruptcy legislation is in the area of economics and social welfare. . . . There is no constitutional right to obtain a discharge of one's debts in bankruptcy". 409 U.S., at 446. Antitrust litigation similarly is in the area of economic and social welfare, and it needs no elaboration that there is no constitutional right to pursue antitrust claims. "Government's role with respect to the private commercial relationship is qualitatively and quantitatively different from its role in the establishment, enforcement and dissolution of marriage." 409 U.S., at 445-46.

In *Boddie*, moreover, this Court emphasized the fact that the state had monopolized the means for legally dissolving marriage and absolutely no alternative existed to effect dissolution. In *Kras*, however, the Court concluded (409 U.S., at 445) that alternatives to judicial proceedings were available. Kras could theoretically have solved his economic problems through private arrangements. Of course, just such a possibility existed in the instant case.

Moreover, the Nabcor Plaintiffs are suing in a *federal* forum and pursuing a *federally-created* right, so there is obviously no state monopolization of the means of asserting the right. *Ross* v. *Moffitt*, 417 U.S. 600 (1974).

(D) DR 7-109C *Is* Not Violative Of The Due Process Clause.

Boddie, according to its majority opinion, was a due process case. Since, as discussed above, resort to the courts in the instant case is not the exclusive avenue for redress, the Due Process decisions cited in *Boddie* have little bearing on the issue *sub judice*. Moreover, it is obvious that the Nabcor Plaintiffs have had an opportunity to be heard. Thus a fundamental requisite of due process has been satisfied. It is also apparent, as discussed earlier, that DR 7-109C is not an arbitrary prohibition.

Even if this were to be deemed a case involving access to the courts, *Cohen* v. *Beneficial Loan Corp.*, 337 U.S. 541 (1949), is controlling. *Cohen* involved a constitutional challenge to a state statute that required security for the reasonable expenses and attorneys' fees which a corporation may incur or for which it may become liable in any stockholder derivative action in which the plaintiff's interest as a shareholder is less than 5% of the value of all outstanding shares and has a market value of less than $50,000. Plaintiff argued (337 U.S., at 552) that the security requirement violated due process because it "foreclose[d] resort by most stockholders to the only available judicial remedy for the protection of their rights". This Court was unpersuaded (p. 552):

> "A state may set the terms on which it will permit litigations in its courts. . . . Of course, to require security for the payment of any kind of costs or the necessity for bearing any kind of expense of litigation, has a deterring effect. But we deal with power, not wisdom; and we think, notwithstanding this tendency, it is within the power of a state to close its courts to this type of litigation if the condition of reasonable security is not met."

(E) DR 7-109C Does Not Violate The Equal Protection Clause Of The Fourteenth Amendment.

The essence of petitioner's Equal Protection argument before the Court of Appeals was that DR 7-109C established an irrational classification based on wealth: those able to pay expert witnesses reasonable fees do not need to resort to contingent fee arrangements, while those unable to pay these fees are denied the opportunity to have expert testimony and thus are denied equal protection of the law.

Wealth discrimination, however, is not a suspect classification such that strict judicial scrutiny is required. *Massachusetts Board of Retirement* v. *Murgia*, 427 U.S. 307 (1976). See *San Antonio School District* v. *Rodriguez*, 411 U.S. 1 (1973) holding (p. 29):

> "this Court has never heretofore held that wealth discrimination alone provides an adequate basis for invoking strict scrutiny".

Since there is no fundamental right to litigate antitrust actions, the instant case involves solely wealth discrimination. Thus, strict judicial scrutiny is not required. Moreover, "[d]ifferences in ease of access to the courts have not been held to implicate such fundamental rights that the state must show a 'compelling state interest' to support any differentiation". *Manes* v. *Goldin*, 400 F.Supp. 23, 29 (E.D.N.Y. 1975), *aff'd*, 423 U.S. 1068 (1976), upholding the constitutionality of New York State statutes raising court filing fees and charges in New York City.

It follows that the standard to be applied in this case is that of rationality, and as demonstrated, DR 7-109C is clearly rational. *McGowan* v. *Maryland*, 366 U.S. 420, 426-46 (1961).

(F) DR 7-109C Does Not Interfere With First Amendment Freedoms

As part of his broad based challenge to the Rule's constitutionality, petitioner advances the argument that DR 7-109C violates the First Amendment. (Pet., pp. 46-49) Petitioner proceeds on the theory that he is a "private attorney general" and lawsuits brought to enforce the antitrust laws are associational political activity similar to that protected in *NAACP* v. *Button,* 371 U.S. 415 (1963). Suffice it to say that the District Court ignored the argument, doubtless finding it completely devoid of merit, and the Court of Appeals likewise rejected it, stating (App. 53a-54a):

> "The New York rule is not analogous to a Virginia statute regulating the solicitation of legal business which the Supreme Court struck down in *NAACP* v. *Button,* 371 U.S. 415 (1963), cited by appellee. In contrast to the Virginia statute invalidated in *NAACP* v. *Button,* the New York disciplinary rule is specific, not subject to selective enforcement because of vagueness, and its effect on first amendment rights, if any, is remote. DR 7-109C does not deny attorneys or their clients access to the courts—it merely forces attorneys and litigants to finance the payment of experts in a manner not related to the outcome of the litigation. Courts have for centuries possessed disciplinary powers incident to the administration of justice. *NAACP* v. *Button, supra,* 371 U.S. at 456 (Justice Harlan dissenting). DR 7-109C is a proper exercise of such a power."

As to the balancing of interests argument advanced by petitioner (Pet. 48), we suggest that such an argument and the weight to be attributed to it should be addressed to the agencies responsible for the enforcement of the Disciplinary Rule, rather than to a federal court. A balancing was performed by the State in adopting DR 7-109C. Any revision should be accomplished by a legislative process, where all

of the factors suggested by the petitioner may be given appropriate consideration, after hearings if necessary, rather than by constitutional dictate. The federal courts should not substitute their judgment, as to the most desirable method of regulating the legal profession, for the judgments of the state agencies entrusted with that responsibility. Even tested by a standard of strict judicial scrutiny, the disciplinary rule is constitutional by reason of the compelling interest which the State has in regulating the standards of an attorney's professional conduct.

Conclusion

It is respectfully urged that the basis for DR 7-109C is rational and that the prohibition is a proper exercise of state power. It is not unreasonable for the State of New York to have followed its own common law rule, and after mature consideration by both The American Bar Association and the New York State Bar of Rule DR 7-109C to have concluded in Appellate Division Rules 603.2 (1st Dept.) and 691.2 (2d Dept.) that the existence of the *contingency* (payment of fees based upon the *outcome* of a litigation) in and of itself, regardless of whether the contingent fee may be reasonable, tends to cause false testimony and should be prohibited.

The petition for a writ of certiorari should be denied.

Dated: New York, New York
October 11, 1977

Respectfully submitted,

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